Central Law Journal.

ST. LOUIS, MO., JULY 19, 1895.

The adoption of what is known as the "Torrens" system of land transfers by the legislature of the State of Illinois is noteworthy, and marks a step in the progress of reform in the direction indicated, which will give encouragement to its friends in other States. The measure has been for some years urged by those who are justly dissatisfied with the present cumbersome means of transferring and registering title to land, but Illinois is the first State to put the new system upon the statute books. Though by the terms of the act it is not to take effect in any county until it is adopted in that county by a vote of the people, it is believed that it will be adopted generally by all the counties. We find a detailed statement of the scope and effect of the act in a late issue of the *Chicago Legal News*. Under the act the title is registered in contradistinction to the registration of the evidence of title. The central principal of the act is that every question, whether of form or substance, that may affect the title or interest intended to be conveyed, shall be settled once for all at the time of the transfer. As a consequence there will be no going back of the certificate of title. The history of the title back of this certificate is rendered of as little consequence as the history of the title to a share of stock in a corporation. There will be no occasion to inquire into it. This will, in time, do away with abstracts of title altogether. The manner of keeping the books in the registrar's office is very simple. It is like keeping a ledger account with each piece of property; but few books will be required. By reference to the tract index, one will find on what page the account with a given piece of property is to be found, and by looking at that page, the condition of the title will be seen at a glance. No transfer can be made or lien put upon the property except upon the record. This will do away with the acquisition of title by adverse possession. Squatters are given no quarters under the act. No new offices are created if we except examiners of titles who are deputies of the registrar. The recorder is *ex officio* registrar of titles in his county, and the offices of recorder and registrar are kept together. No person is compelled to register his title, but may do so at his option. A title once registered must continue under the system.

The most difficult questions with which the act has to deal are those pertaining to first registration—the effect to be given the first certificate of title. In Australia, England, Prussia, Canada, etc., where the system is in operation, there is no difficulty about giving the certificate conclusive effect immediately upon its being granted, but in this country that cannot be done. The Constitution of the United States and of the several States render it impossible to divest one of his interest in property except by due process of law, and the act does not attempt to violate this principle. The registrar is not made a judicial officer, and the granting of the certificate of title is not a judicial act. The certificate is not by its own vigor conclusive. By the terms of the act, the registration of this certificate starts the running of the statute of limitations contained in the act. It is this statute of limitations running upon this matter of record which concludes adverse claims, and not the finding of the registrar. The time given in which one may claim adversely to the registered certificate is five years.

In other words, no one can gainsay a certificate who does not come forward with his claim within five years after the first certificate is registered. This limitation cuts off all claims of every nature, whether in favor of infants, lunatics, or other persons. But the law provides for an indemnity fund, out of which anybody, whose interest is cut off by this limitation or by any mistake or wrong of the registrar or anybody else, may obtain the value of such interest. The registration becomes effective at once as to all persons dealing with the land after it is bought under the act. It is only those who may possibly have an interest adverse to the registered title who have the five years to bring forward their claims. The act fully provides for protection in all interests that cannot be brought forward within five years, such as contingent remainders, reversionary interests, and the like.

The policy of the act may be likened to

that with reference to negotiable instruments, which enables one to deal in them with safety so far as latent equities are concerned, and with the least expense or delay.

NOTES OF RECENT DECISIONS.

DIVORCE — ALIMONY — ENFORCEMENT OF DECREE IN FOREIGN JURISDICTION.—In Bullock v. Bullock, 31 Atl. Rep. 1022, it was held by the Supreme Court of New Jersey that an action at law may be maintained in New Jersey upon a decree for alimony made in New York, if the New York court had jurisdiction of the subject-matter and of the person of defendant. The court says that "in Van Buskirk v. Mulock, 18 N. J. Law, 184, Chief Justice Hornblower held that at the common law an action of debt will not lie on a decree of a court of equity for the payment of money. In the recent case of Insurance Co. v. Newton, 50 N. J. Law, 571, 14 Atl. Rep. 756, this court discussed that question, taking the contrary view, and citing a number of cases in support of it. In Evans v. Tatem, 9 Serg. & R. 252, Chief Justice Tighlman gave a foreign decree in equity the conclusive force of a judgment between the parties to a suit on it in Pennsylvania. The same rule prevails in the courts of Massachusetts and New York. Howard v. Howard, 15 Mass. 196; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. Rep. 405. The question as to the conclusive effect of the decree is no longer an open one in this State. In the recent case of Bullock v. Bullock, 30 Atl. Rep. 676, the court of errors and appeals, while refusing to establish a decree for alimony made in New York as a lien upon ands in New Jersey, declared 'that the decree in New York conclusively determined the *status* of the parties to that action, and that the marital relation previously existing between them had been absolutely dissolved. If, by the direction to pay alimony, an indebtedness arises from time to time, as such payments become due, an action at law will lie thereon, and the decree will furnish conclusive evidence of such indebtedness.' "

LIFE INSURANCE—PRESUMPTION OF SUICIDE. —In Johns v. Northwestern Mut. Relief Ass'n, 63 N. W. Rep. 276, it was decided by the Supreme Court of Wisconsin that evidence that a person went to bed as usual and in the morning was found drowned in a cistern, the opening to which was 15 by 20 inches, raises a presumption of suicide, so as to defeat recovery on a policy of life insurance excepting risks arising from suicide. The court said in part:

Counsel for the plaintiff is undoubtedly correct in contending that "when the dead body of the insured is found under circumstances, and with such injuries, that the death may have resulted from negligence, accident or suicide, the presumption is against suicide, as contrary to the general conduct of mankind." May. Ins. sec. 325. Whether the death was accidental or intentional, whenever there is any evidence bearing upon the point, is a question of fact for the jury or court. *Id.* It is only essential that the evidence preponderates against the presumption of accident. Bachmeyer v. Association, 87 Wis. 337, 338, 58 N. W. Rep. 299. "A presumption of suicide cannot be indulged in as a mere presumption, without any fact or circumstance upon which it can be logically predicated." Sorenson v. Pulp Co., 56 Wis. 338, 14 N. W. Rep. 446. Counsel for the plaintiff seem to rely in part upon that case, but there were no facts or circumstances in that case from which suicide could be inferred. On the contrary, they were all harmonious with death by accident. The same is true with Cronkhite v. Insurance Co., 75 Wis. 116, 43 N. W. Rep. 731. Under the contract of insurance in the case at bar the plaintiff could only recover by showing that the death was the result of, or brought about by, "some external cause or accident, and not by disease or any volntary act of the member." The burden of proving such facts, subject to the presumption mentioned, was upon the plaintiff Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. Rep. 1360. Under the contract of insurance, this defendant did not assume the risk in case Hubert Johns committed "suicide or self-destruction, · · · whether voluntary or involuntary, sane or insane, at the time thereof." It is immaterial, therefore, whether at the time of his death he was sane or insane. Bigelow v. Insurance Co., 93 U. S. 284. In the absence of any evidence to the contrary, we must assume that Hubert was like other ordinary men; that he had two legs, and walked upon his feet; that in walking he stepped one foot at a time; that in taking a step with one foot the other necessarily remained upon the ground until the step was completed; that, if he accidentally stepped into the hole, it could only be with one foot, and that that foot would necessarily go down in the hole, while the other foot remained upon the ground, and his body and arms and hands would necessarily fall over and beyond the hole. It is conceded and found that the hole was only 15 by 20 inches square by actual measurement. The size of an ordinary man is of common knowledge, and we take judicial notice that no ordinary man could go through such a hole unless he went head first, or with both feet first; and that it is very improbable, if not impossible, for such a man, walking upon the ground, to fall into such a hole, either head first or with both feet first, by mere accident, and without any design or purpose of thus going down into the cistern. And if we assume that he intentionally thus went down into the cistern, at the time and under the circumstances mentioned, then the inference of "suicide or self-destruction," within the meaning of the contract, seems to be sufficient to overcome any presumption of accident that might otherwise be indulged.

RATIFICATION BY CORPORATION OF UNAUTHORIZED ACT OF AGENT.

A great portion of the business of the country is now transacted by corporations; in fact there is scarcely any line of business which is not carried on to a greater or less extent by corporations. One reason for this is, that in many States the stockholders in a corporation are not liable for the indebtedness contracted by it beyond the amount of their unpaid capital stock therein. In other words, if the stock has been fully paid for, the stockholders cannot be held liable for any indebtedness of the corporation. By paying in full for his shares of the stock he is released and relieved from any and all liability for any indebtedness contracted which the assets of the corporation itself cannot and do not fully satisfy, and his individual estate cannot be reached for the purpose of paying such indebtedness. He can only lose the amount of capital stock which he has subscribed and paid in, and, if not paid in full, that which remains still unpaid. And, as corporations can only act by agents, the question "to what extent is a corporation bound by the unauthorized acts of its agents, which it has failed to promptly disaffirm when brought to its notice," is one of importance. But a question of still more importance is "what kind of acquiescence or failure to act promptly will be held to be equivalent to a ratification and make the corporation liable for the unauthorized acts of its agents?" In other words, if the act done by the agent is one which he could only be empowered to perform by a resolution adopted at a regular meeting of the board of directors of the corporation, or at a special meeting of such board called for that purpose, such resolution being adopted by a majority of the directors present at such meeting, and the number present constituting a quorum and authorized to act, can the unauthorized act of the agent be validated and thus made binding on the corporation by the simple silence and tacit acquiescence of its directors after the fact has been brought to the knowledge of each of them individually, or by their failure to disaffirm such act after such knowledge, and where there has been a meeting at which action might have been taken, or must the ratification be made in the same solemn manner that would have been required to originally authorize the doing of the act?

As it is well known that corporations are generally believed to be "soulless entities" and to have no definite ideas of the meaning of the word "honor," but to rely upon any technicality that can by any possibility be made available to avoid legal liability for anything that has been done by their representatives, and as others who may have acquired an interest in the assets of such corporation are also liable at any time to raise and rely upon these same technicalities when it may be to their pecuniary interest to do so, this last question, or rather the answer to it, becomes one of far more than ordinary importance.

It seems to be a well settled rule of law, that when there is a meeting of the board of directors of a private corporation (other than a regular meeting, the time and place, when and where the same is to be held, are provided by the charter, articles of incorporation, or some by-law duly adopted and of which each director is presumed to have knowledge) for the transaction of any business, due and legal notice must be given to each and every member of the board of the time and place of such meeting, or any business transacted will not be valid and binding on the corporation.[1]

The meeting referred to in the Doernbecher case just cited was not a regular but a special one, and there is no doubt but that in such a case notice of some kind of the time and place of such meeting to each director was necessary,[2] for the reason that the government and management of the business of the corporation had been delegated by the stockholders to a certain number of persons by them duly selected on account of the trust and confidence reposed in them. This trust and confidence are reposed in the whole number of directors or in a majority of the whole

[1] Doernbecher v. C. C. L. Co., 21 Oreg. 573, where it was held: "It is indispensable to a legal meeting of the directors of a corporation for the transaction of business that all the directors have notice of the time and place of meeting, either actual or constructive. Any action had at a meeting called without such notice being furnished is void, and may be so regarded in a direct attack thereon by suit or in a form of an objection to the admission of transactions of such a meeting in evidence."

[2] Morawetz on Incorporations, § 532. See, also, 29 Am. S. R. 60; 37 Am. Dec. 203-227; 18 Am. Dec. 99.

number thus selected, and not in a majority of a quorum only, when the ones not present had no notice of the meeting and no opportunity to be present and consult and advise with those who were duly notified and were present; and for the further reason that if a bare quorum can legally meet and transact business without notice of the time, place and object of the meeting having been duly given to the others so that they might also be present, a minority of the directors might in all such instances assume the control and management of the business of the corporation to the complete exclusion of the majority. Thus, if the board consists of seven members and three are desirous that a certain policy should be adopted, and the officers of the corporation instructed to do certain things in order that the desired object might be attained, but it is known that the other four are opposed to this policy, a notice to the three favoring and to two only of those opposing such action by the board, the five meet and adopt the necessary resolution authorizing and empowering the officers to take the necessary steps to effect the desired end, a quorum will be present, a majority of the quorum will vote for the resolution and it will be carried and entered on the record, but it will be contrary to the will of the majority and thus the minority will be permitted to control. But that this may not be so, it is generally held that notice must be given to each director, but he need not attend unless he wishes to do so, and, if such notice be given, the action taken will be valid and binding on the corporation, although only a quorum was present and but a bare majority of such quorum voted in favor of such action. Therefore any step of this character must be taken at a regular meeting, or at a special meeting of which each member has been duly notified. Is it true that an act performed by the officers without authority given them in this solemn manner in order to be valid and binding must be ratified in like manner?

No action shall be maintained for the recovery of real property unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of said action, and open, notorious, exclusive and adverse possession of land under color of title for ten years is usually held to be a good defense to any action for its recovery. Under the statutes of frauds, any conveyance of real property made by an agent of the party sought to be charged is void unless the authority of the agent be in writing.

Suppose this case: The agent of A, without any authority in writing so to do, sells to B the land of A, executes and delivers to B a deed therefor, and B, under such deed, takes possession of the land and holds and claims to own the same; the deed under the statute is void, and A is entitled, under the statute of limitations, to rest on his oars for nearly ten years before resorting to the courts to assert his rights and recover the possession of the land. With full knowledge that his agent has deeded this land to B, who has taken possession and claims to be the owner thereof, A does remain quiet and takes no step to disaffirm the act of his agent until the expiration of nine years, and then begins an action of ejectment against B. Will he be entitled to recover? We think not. By his silence and acquiescence, and, in all probability by the receipt of the proceeds of the sale, he has fully ratified and confirmed all that had been done by his agent with full knowledge of all the facts and circumstances connected with the transaction. To permit him then to recover this land would be to permit and sanction in the name of the law and by authority of the court the perpetration of a fraud by him. But the statute was not enacted for the purpose of aiding one party to defraud another, but to prevent fraud; it cannot, therefore, be used by the apparent vendor to enable him to defraud the vendee. Will the same rule apply to a corporation?

"The salutary rule in relation to agencies, that when the principal, with a knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them under the pretense that they were done without authority, or even contrary to instructions, applies as well to corporations as to natural persons, and is equally to be presumed from the absence of dissent."[3]

But these do not answer the question. The persons who are chosen as directors of a corporation do not act as a "board of directors,"

[3] 17 Am. & Eng. Ency. of Law, 162.

except when they are assembled together in their official capacity. When not so assembled they are not individually agents of the corporation, nor are they, under these circumstances, collectively representing the corporation in any capacity, they are simply private citizens. But in Sherman v. Fitch[4] it is said: "It is not necessary that the authority should be given by a formal vote. Such act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection as well as in the case of individuals." This seems to cover the ground, and in Currie v. Bowman[5] the president and secretary of the corporation, without authority of the board of directors, executed a chattel mortgage; the mortgagee took possession of the stock of goods and proceeded with the knowledge of the directors to sell and dispose of the same; they took no steps to prevent him from so doing so, or to disaffirm the execution of the mortgage, nor did they do anything with reference thereto until several months thereafter, and the court held that by their silence and acquiescence they had ratified the mortgage.

In each of these cases the mortgage executed was a chattel mortgage, but the officers had no more authority to execute mortgages on personal than on real property. In Taylor v. Albermarle Steam Nav. Co.,[6] where the question was whether the defendant had ratified the contract sued on, it was held: "It was not necessary to show a formal ratification of the contract by the board of directors. It was sufficient, as the court charged, if the defendant accepted it, acted under it and performed its terms * * * with full knowledge of its import."

So in Bank & Fricke[7] it is said: "Such ratification need not be by any formal vote or resolution of the corporation, or be authenticated by the corporate seal." Notice to the officers of a corporation of the unauthorized acts of their predecessors in office is notice to the corporation, and if no dissent is expressed ratification will be presumed, and the acts become binding on the corporation.[8]

The New York Court of Appeals decided that "a contract executed and sealed in the name of a corporation by its president and secretary, though without the express consent of the directors, is binding on the corporation when it has received benefits under the contract and conducted its business in compliance therewith in such a manner that the directors must have known it."[9]

In Dayton v. Nell,[10] the court seems to have held that authority to sell land may be given and ratification of an unauthorized sale made by parol, but that authority to convey must be by writing under seal, and "that an act of ratification must be of the same nature required for an authorization;" *i. e.*, ratification of an unauthorized conveyance must be by writing under seal.

And in Gutta-Percha & Rubber Mfg. Co. v. Village of Ogalalla,[11] the Supreme Court of Nebraska held: That "if a contract" (made by a municipal corporation) "is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance." In this case the village had purchased hose, hose-carts, etc., through its trustees for the agreed price of $569, but no appropriation had previously been made for the purpose. The provision of the statute was: "No contract shall hereafter be made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense." It was held that the plaintiff could not show, as ratifying the contract, that the defendant had accepted and used the goods sold and delivered, and was still using them.

[4] 98 Mass. 59, 64.
[5] 35 Pac. Rep. 848.
[6] 10 S. E. Rep. (N. C.) 897.
[7] 75 Mo. 183; cited with approval in Campbell & Pope, 10 S. W. Rep. 189, and Finnegan v. Pacific Vinegar Company, 37 Pac. Rep. 457.
[8] Chouteau v. Allen, 70 Mo. 240.
[9] Jourdan v. Long Island R. Co., 22 N. E. Rep. 153.
[10] 45 N. W. Rep. 153.
[11] 59 N. W. Rep. 515.

But in City of Logansport v. Dykeman,[12] it was decided that "though Rev. Stat. Ind. 1881, Sec. 3099, declares that on the passage or adoption of any by-law, ordinance or resolution, the yeas and nays shall be taken and entered of record, yet a contract by a city council to pay for services to be rendered in effecting a compromise of the city's indebtedness, when such compromise is effected and accepted, is good, though not in writing, and though the vote of the council does not appear upon the record of its proceedings." It was held that the attempted contract was ratified because there were many subsequent meetings of the council, at which all of the councilmen were present, that they knew the facts and there was no dissent or attempt to abrogate it. And in City of Mound City v. Snoddy,[13] it was held that "a mayor of a city, by virtue of his office alone, cannot employ an attorney and create a liability against the city for the services of such attorney; but if such employment is made and an action is begun in the name of the city, and the city council has knowledge of the institution and pendency of the suit, and allows the attorney to proceed with the litigation for a considerable time without protest or repudiation, and afterwards acquiesces in and accepts the fruits of the service, it will operate as a ratification of the employment, and render the city liable for the value of the services."

In Alabama, Great Southern R. R. Co. v. South and North Alabama R. R. Co.,[14] it was held that "under Alabama statute of frauds no legal title to lands will pass by or under a contract made with an agent unless the agent has a written authority," and, "although agent of corporation can convey no legal title to land unless his authority is in writing, yet the directors or governing body may so act as to estop themselves from denying the existence of such written authority, and thus create an equitable estoppel *in pais*, as where the agent acted openly and notoriously, and the corporation for a long time acquiesced in his acts."

The doctrine that the directors of a corporation, unless they promptly disavow and disaffirm the unauthorized acts of an agent when brought to their knowledge, thereby ratify and validate such acts, seems to be fully sustained by the modern authorities.[15] And this doctrine is the only reasonable one which could be adopted. A corporation can act only by and through its agents and officers. The directors are the agents of the corporation, vested by it with the power and authority to act for it, and whatever is done by the directors is done by the corporation, and any failure by the directors to act promptly, when such action is necessary and proper, is the failure of the corporation to act. In other words, the directors constitute the corporation to all practical and legal intent. Therefore, if any agent appointed by the corporation exceed his authority, or if any person assuming to act as an agent of the corporation does any act by which he attempts to bind the corporation, it is the duty of the directors, whenever the matter is brought to their attention, with all the necessary facts and circumstances surrounding it, promptly to disavow the unauthorized act, or, failing so to do, the law will assume that the such act was either authorized, or, if unauthorized, was ratified by the corporation by silence and inaction.[16]

D. R. N. BLACKBURN.

Albany, Oreg.

[12] 17 N. E. Rep. (Ind.) 587.
[13] 35 Pac. Rep. (Kan.) 1112.
[14] 5 Am. St. Rep. 401, 84 Ala. 570.
[15] 2 Mor. on Corp., § 618; Kelsey v. Bank, 69 Pa. St. 429; Scott v. R. R. Co., 86 N. Y. 200; Scott v. First M. E. Church, 15 N. W. Rep. 891; Phosphate, etc. Co. v. Green, L. R. 7 C. P. 63; Milling Co. v. Donat, 16 Pac. Rep. 157; Sheldon Hat Blocking Co. v. Eickmeyer Hat Blocking Co., 90 N. Y. 613; Kent v. Mining Co., 78 N. Y. 187; Smith v. Ayer, 101 U. S. 320; Fidelity, etc. Co. v. Shenandoah Val. R. R. Co., 9 S. E. Rep. 180.
[16] Sheaver v. Bear River, etc. Mining Co., 10 Cal. 396; Bleu v. Bear River, etc. Mining Co., 20 Cal. 602; Olcott v. Tioga, etc. R. Co., 84 Am. Dec. 298; McLaren v. First National Bank of Milwaukee, 45 N. W. Rep. 223, 34 Pac. Rep. 527.

LIBEL—MISTAKE—DAMAGES.

TAYLOR V. HEARST.

Supreme Court of California, May 23, 1895.

1. In an action for libel, the fact that the publication was due to carelessness, inadvertence, or mistake, is no defense.

2. Where the evidence clearly shows that the publication was not made with any ill-will to plaintiff or with any intent to injure him, it is not error for the court to instruct the jury that punitive damages cannot be awarded.

3. In action for libel, damages for injuries to plaintiff's feelings may be recovered, though not specially alleged or proven.

BELCHER, C.: The defendant W. R. Hearst, was sole proprietor of the daily newspaper pub-

lished in San Francisco and known as the "The Examiner." On January 10, 1892, there appeared in that paper an article charging, in substance, that J. W. Taylor had a contract with the city of San Francisco to supply basalt blocks for paving streets, at the rate of $45 per 1,000, and that he and one Henry Barron, who had been appointed keeper of the corporation yard near the foot of Sixth street, and whose duties required him to keep track of material belonging to the street department, had conspired together to cheat and defraud the city by getting fraudulent receipts for blocks never delivered; that 34 fraudulent receipts were obtained for 34 loads of blocks not delivered, and that afterwards Taylor swore to and filed a demand for payment on his contract, including the 34 bogus loads; that steps were then taken to prosecute him for perjury, but it was found that the demand had been sworn to before a clerk of the board of supervisors not authorized to administer an oath, and so the only thing for the city to do was to keep Mr. Taylor's demand until the bogus 34 loads were eliminated from it. The defendant had no knowledge of this article before or at the time of its publication, but his attention was called to it, and four days later a correction thereof was published in the paper in the following words:

"A CORRECTION.

"In an article which appeared in these columns on Sunday last referring to frauds on the public in connection with the furnishing basalt blocks to the city, the initials of J. N. Taylor were erroneously printed 'J. W.' J. W. Taylor, the contractor, had nothing to do with the transaction, and was in no way associated with Henry Barron, who was arrested at the same time as J. N. Taylor for conspiracy."

In April, 1892, plaintiff commenced this action, alleging in his complaint that he was then and had been for more than ten years engaged in the business of manufacturing and supplying basalt blocks to the city and county of San Francisco, and to various persons and corporations in the city; that the defendant was the sole proprietor and publisher of the newspaper named "The Examiner," which had a large and extensive circulation in the city and county of San Francisco and throughout the entire State of California; that on January 10, 1892, the defendant did falsely and maliciously publish in said newspaper of and concerning the plaintiff the article before referred to, a copy of which was annexed to the complaint as an exhibit, and "that by means of said false, malicious, and defamatory publication said defendant intended it to be believed and understood, and that it was generally understood by those who read said article in said newspaper, that this plaintiff had been and was guilty of the crime of stealing and thieving by the use of fraudulent receipts and swearing to false demands against the city and county, and it also was intended by said defendant that said article was to be understood and believed, and it was generally understood, that said plaintiff was dishonest in his business and occupation of contracting with the said city and county in furnishing basalt blocks, and that he merely escaped prosecution for the crime of perjury because the deputy clerk of the board of supervisors was not authorized to administer the oaths to the fraudulent demands;" and that by reason of said publication plaintiff had been greatly injured in his good name and reputation, to his damage in the sum of $10,000, for which he asked judgment.

The answer admits that defendant was the proprietor and publisher of "The Examiner," and that the said article was published therein on the 10th of January, 1892, but denies that he falsely or maliciously published the same of or concerning the plaintiff, and specifically denies all the other material averments of the complaint. It then alleges that the said charges were not made against the plaintiff, and were not intended to be considered or understood as charges against the plaintiff, but were made, and were intended to be so considered, against one J. N. Taylor, and that in the printing of said article the initials of said J. N. Taylor were printed J. W., and that as soon as said mistake was discovered a correction thereof was duly published in the news columns of the said paper in the words above set out.

The case was tried before a jury, and the verdict was in favor of the defendant. Judgment was thereupon entered that the plaintiff take nothing by the action, and that defendant recover his costs, amounting to the sum of $165.50. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order.

It was proved at the trial in defense of the action that there was a John N. Taylor who had had a contract with the city to furnish basalt blocks, and had presented a bill against the city for 207,004 basalt blocks, at $53 a thousand, which was sworn to by him; that the superintendent of streets deducted from the bill $340.80 on the ground that 6,600 of the blocks had not been furnished, and that there was a prosecution against Taylor for perjury, but the prosecution was dismissed because the oath was taken before the deputy clerk of the board of supervisors. It was also proved that the person who wrote the article complained of was directed by the managing editor of "The Examiner" to see the superintendent of streets, and get the actual facts as to the frauds that were being perpetrated upon the city in furnishing basalt blocks, and that he did so; and that by mistake, and without any malice towards the plaintiff, the middle initial of Taylor's name was printed "W" when it should have been "N." The only evidence introduced showing that any other persons who read the said article understood it as applying to the plaintiff, and the only evidence as to damage resulting from the publication, was that of the plaintiff himself, who testified: "I have suffered this much actual damage, that lots of my friends all

over the county say: 'You are a pretty fellow; what are you going to do now? Are you going to San Quentin next?' I don't know that I have lost any money by it. I have lost a lot of credit by it." The court refused to give to the jury any of the instructions asked by the plaintiff, but gave among others, the following: (5) "The court further instructs you, as a matter of law, that the publication in question, being as to the plaintiff untrue and unprivileged, is libelous, and that the plaintiff is entitled to such compensatory damages as shall afford a reparation for all the injury which has naturally and proximately resulted from the publication; provided you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the commission of the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff. The amount of these damages, if you find for the plaintiff, is to be determined by you in accordance with this rule, and it is within your power, under the circumstances of the case, to award the plaintiff nominal damages only." (6) "Under certain circumstances, the recovery may go beyond mere reparation or compensation, and the jury may award that which the law terms 'punitive' or 'exemplary' damages. To authorize such damages, however, it must appear from the circumstances of the case that the wrongdoer acted with a malicious purpose towards the person aggrieved, with a wicked and malignant intention to injure, and that the wrong was not the result of a mistake of fact, or the honest misapprehension as to either right or duty. From this statement you will see that 'punitive' or 'exemplary' damages cannot, as a matter of law, be awarded by you under the facts of this case." (7) "You are restricted to compensatory damages in the event that you find for the plaintiff, which I have already told you may be nominal." The plaintiff excepted to each of these instructions, and now assigns the giving of them as errors.

Libel is a false and unprivileged publication, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business; and the proprietor of a newspaper in which a liable is published, though he had no knowledge of the publication at the time, is as responsible for it as he would have been if it had been done by him personally or under his direct supervision. To constitute libel there must be malice, actual or implied, on the part of the publisher. Actual malice exists when the publication is made through motives of ill will and with intent to injure or defame, and the law presumes malice when the article published is libelous *per se*. Such malice is called "malice in law," and it signifies a wrongful act intentionally done. Under our statute, in an action for libel, where the defendant has been guilty of malice, actual or presumed, "the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." Civ. Code, § 3294. The defendant may, however, prove any mitigating circumstances to reduce the amount of the damages (section 461, Code Civ. Proc.), and among other things, he may prove that there was no malice in fact. But such proof is not sufficient to defeat the action or to prevent the plaintiff from recovering such damages as he has actually sustained by reason of the publication. Wilson v. Fitch, 41 Cal. 363; Lick v. Owen, 47 Cal. 252; Mowry v. Raabe, 89 Cal. 606, 27 Pac. Rep. 157; Childers v. Publishing Co. (Cal.), 38 Pac. Rep. 903. In the case last cited it is said: "Two classes of damages may be recovered in actions for libel, to-wit, actual or compensatory damages and exemplary damages. Special damages, as a branch of actual damages, may be recovered when actual pecuniary loss has been sustained, and is specially pleaded. The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc.; and, while special damages must be alleged and proven, general damages for outrage to feelings and loss of reputation need not be alleged in detail, and may be recovered in the absence of actual proof, and to the amount that the jury estimates will fairly compensate plaintiff for the injury done. Wilson v. Fitch, 41 Cal. 386. Exemplary damages may be recovered when malice on the part of the defendant is established as a fact." The article here complained of was libelous *per se*. It charged J. W Taylor with dishonesty and criminal conduct, and, according to plaintiff's undisputed testimony, must have been understood by his friends as applying to him. It is true it was made to apply to him by mistake, but that did not justify or excuse the publication. As said in the note to McAllister v. Press Co. (Mich.), 15 Am. St. Rep. 339, 43 N. W. Rep. 431, where the authorities on the subject of libel are very fully reviewed: "One who has published a libel on another cannot successfully resist the latter's action for redress by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence or mistake, hence it is not a sufficient defense that the publication of a libel resulted from an error in setting type." The "correction" or retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action. By instruction No. 5 the court told the jury that, the publication being untrue and libelous as to the plaintiff, he was entitled to such compensatory damages as would afford a reparation for all the injury which had naturally and proximately resulted from the publication; "provided you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff." This was, in effect, telling the jury, and it must have been so understood, that unless the defendant meant to

charge the plaintiff with the offenses contained in the publication, and third persons so understood it, the plaintiff was not entitled to recover compensatory damages for the injury he had sustained. The proviso attached to the instruction was erroneous. The publication did charge the plaintiff with offenses, and whether it did so by design, or was the result of carelessness in setting type, was a matter of no consequence, so far as the question of actual damages was involved.

It is claimed for appellant that instruction No. 6 was also erroneous, but we see in it no prejudicial error. It is true that in an action for libel the question whether there was such malice on the part of the defendant as would entitle the plaintiff to recover exemplary or punitive damages is ordinarily one of fact for the jury. But in this case it was clearly established that the publication was not made by reason of any ill will against the plaintiff or with any intention to injure or defame him. That being so, the plaintiff was not entitled to exemplary or punitive damages, and the court did not err in so telling the jury. One of the instructions asked by the plaintiff and refused was in these words: "In considering the amount of damages to be awarded, you may consider the injury to the plaintiff's feelings." This instruction should have been given. It was not necessary that damages resulting from injury to feelings be specially alleged, or that proof of such injury be specially given. It is claimed for respondent that the plaintiff was entitled at most to only nominal damages, and that in such case the verdict should not be disturbed, citing the maxim, "*de minimis non curat lex*." The same point was made in Lick v. Owen, *supra*, and the court said: "The rule may possibly be as stated in actions *ex contractu*, when, for the technical breach of a contract, the court can see that, as a matter of law, the plaintiff would be entitled to only nominal damages. But in an action for libel the question of damages is for the jury, and the court cannot assume, as matter of law, that the plaintiff is entitled to only nominal damages." The judgment and order should be reversed, and the cause remanded for a new trial.

We concur: Searls, C.; Vanclief, C.

PER CURIAM. For the reason given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

NOTE.—The doctrine of the principal case that one who has published a libel cannot defend on the ground that he did not intend to publish it, that its publication was due to carelessness, inadvertence or mistake, may be regarded as fairly well established by the authorities. In McAllister v. Detroit Free Press Co., 76 Mich. 338, 15 Am. St. Rep. 339, 43 N. W. Rep. 431, cited above, a newspaper reporter carelessly, recklessly and negligently published an item indicating that plaintiff had been arrested on suspicion of a felony when in fact the arrest was for a misdemeanor only, of which, in fact, the plaintiff was entirely innocent. It was held that the case should have been submitted to the jury. Said the court, Morse, J.: "No newspaper has any right to trifle with the reputation of any citizen, or by carlessness or recklessness to injure his good name and fame or business. And the reporter of a newspaper has no more right to collect the stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen and to his detriment, and publish such stories and facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street. If true, such publication or such speaking may be privileged, but if false, the newspaper as well as the citizen must be responsible to any one who is wronged or damaged thereby." A case more nearly on all fours with the principal case was Shepheard v. Whitaker, L. R. 10 C. P. 502. There the libel complained of was printed in a periodical publication circulating amongst booksellers and stationers. By a mistake in the arrangement of the matter known as "London Gazette Announcements" by means of which the names of plaintiff's firm, who were stationers, was inserted under the head "First Meetings in Bankruptcy" instead of under the head "Dissolution of Partnerships." In a count for libel the *innuendo* was "meaning thereby that the plaintiff had been bankrupt or had taken proceedings in liquidation or for composition." The jury having found the publication libelous and having assessed the damages at £50, the court refused to arrest the judgment or interfere with the finding. A similar case is Blake v. Stevens, 4 Fost. & Fin. 232, which, for other reasons also, is interesting to lawyers and law writers. There the libel was published in a work entitled "Pullings' Law and Practice of Attorneys." The statement of the text was: "The power to remove from the rolls the name of an attorney who has misconducted himself is simply the power of the court over one of its officers shown to be no longer trusted." To this there was a foot note reference: "See '*Re* Blake,' 30 Law Journal, Queen's Bench, p. 32, where the attorney having borrowed money of a person not then his client on deposit of a mortgage deed, afterwards got it back, and without the lender's consent received the money and appropriated it, the court ordered him to be struck off the rolls." In the report cited, it appeared that Blake had, in reality only been suspended for two years. The court held that, while a text-writer having occasion to treat of topics connected with professional misconduct is privileged in citing or stating the effect of reported cases of such misconduct, if he does so fairly and with reasonable care, yet if through the want of such reasonable care, he makes serious misstatements as to the nature or even the degree of the misconduct, in a particular instance, he will lose his privilege and be liable to action. But where in the publication of an article written by the plaintiff himself and published as a gratuitous puff, ludicrous but innocent mistakes are made in consequence of the illegibility of the handwriting, the publication will not be held a malicious libel, though the item, as printed, necessarily exposes plaintiff to derision, to which derision the item, as written by him, contributes quite as much as the errors of the printers in deciphering his manuscript. Sulling v. Shakespeare, 46 Mich. 408, 41 Am. Rep. 166. In a Massachusetts case (Smith v. Ashley, 11 Metc. 367, 45 Am. Dec. 216), the defense was that the alleged libel was supposed by the editor of the newspaper to be a fictitious story, not intended to apply to the plaintiff or any other person, and that so, it was intended to be understood by the writer. The court held, on the authority of Dexter v. Spear, 4 Mason,

115, that the publisher of the libel was not liable, if he had no knowledge that it was not libelous; that if the defendant had no knowledge that the article published was libelous he has been guilty of no wrong and he is not responsible by law, although the plaintiff has thereby been injured. I think it is extremely doubtful whether the courts would take this view at the present time. WILLIAM L. MURFREE, JR.

JETSAM AND FLOTSAM.

CORPORATE ASSETS AS A "TRUST FUND."

It is to be hoped that the United States Supreme Court will soon explain its decision in Hollins v. Brierfield Coal Co., 150 U. S. 371. When the decision first appeared it seemed as if the last nail had been driven in the coffin of "the great American trust-fund doctrine." The recent case of Sutton Mfg. Co. v. Hutchinson, 63 Fed. Rep. 496, however, seems to show that there is a difference of opinion among the members of the Supreme Court as to the effect of its decision. The Circuit Court of Appeals in the seventh circuit, in the opinion by Mr. Justice Harlan in Mfg. Co. v. Hutchinson, distinctly lays down the doctrine that, when a corporation becomes insolvent and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors; that the directors thereupon occupy a fiduciary position toward creditors, and that a preference to a director is therefore void. The court, curiously enough, cites Hollins v. Coal Co. as an authority for this doctrine. How the language of Mr. Justice Brewer in that case can support the opinion of Mr. Justice Harlan in Mfg. Co. v. Hutchinson, may well puzzle the reader. Mr. Justice Brewer, in Hollins v. Coal Co., says: "The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves." Mr. Justice Harlan, in citing Mr. Justice Brewer's opinion, leaves out the words in italics, and thereby alters the whole meaning of the opinion. The vital question is, does the so-called "equitable lien and trust" in favor of corporation creditors arise upon the insolvency of the corporation or upon the taking possession of the assets by a court of equity? Mr. Justice Brewer's view is clearly that the rights *in rem* of the creditors attach only when the court of equity takes possession of the property. Mr. Justice Harlan holds that when the corporation becomes insolvent and has no expectation of continuing its business, the rights of creditors attach. The issue between the opinions of the two eminent justices seems clear.

The issue also seems clear between the Circuit Court of Appeals for the seventh circuit and that for the sixth circuit. The latter court, consisting of Jackson and Taft, Circuit Judges, and Barr, District Judge, in Brown v. Furniture Co., 58 Fed. Rep. 286, sustained a preference given by an insolvent corporation to its directors. Brown v. Furniture Co. is an authority directly opposed to Mfg. Co. v. Hutchinson, though the court in the latter case does not seem so to have regarded it. Mr. Justice Harlan seems to regard Brown v. Furniture Co. as a decision upon the local law of Michigan. As a matter of fact, however, the decision in Brown v. Furniture Co. is just as much a decision upon the "general jurisprudence" of the United States as Mfg. Co. v. Hutchinson. It is true that the court in Brown v. Furniture Co. does not state whether its decision rests on general or local law; but as no statute of Michigan was involved in the case, the decision was clearly a decision as to the general law of the United Sates.

Mfg. Co. v. Hutchinson has just been followed in another case in the same court, Bosworth v. Jacksonville Bank, 64 Fed. Rep. 615 (C. C. A. 7th Circuit); in which, however, the court seems to be influenced by an idea that the Illinois law should apply, as the case arose in this State. The only difference between the two cases is, that in Mfg. Co. v. Hutchinson the preference was given to a corporation in which the directors of the insolvent corporation were largely interested, while in Bosworth v. Bank the preference was given to the bank in payment of a note for money borrowed of the bank by the insolvent corporation, on which note the president of the corporation was surety. The facts in Bosworth v. Bank, are therefore exactly identical with those in *Re* Wincham Shipbuilding Co., 9 C. D. 322, and the decision in the former case exactly contrary to that in the latter.

With two divisions of the Circuit Court of Appeals clearly opposed to each other, and with Mr. Justice Harlan and Mr. Justice Brewer holding opposite opinions, it seems certain that there will be some dissenting opinions when the Supreme Court decides the question. When that time comes we sincerely hope that the opinion of that very great judge, Sir George Jessel, in *Re* Wincham Shipbuilding Co., 9 C. D. 322, will not be overlooked, as it seems to have been in the Circuit Court of Appeals. — *Edward Avery Harriman, in N. W. Law Review.*

BOOK REVIEWS.

BISHOP'S NEW CRIMINAL PROCEDURE, VOLUME I.

This, the first of the New Criminal Law Series by Joel Prentiss Bishop, is an entirely new work by the well known law writer, based on former editions of his works. It is the plan of the New Series that each volume shall be complete in itself and shall cover its appropriate ground without trenching on that of any other, the whole to be indexed for separate use. This volume is not simply an enlarged edition of his former works on criminal law but has been entirely rearranged and rewritten, which leads the author to remark that "it is a revolution in legal writing whereof we have no precedent in any English speaking country." This volume covers that part of the criminal law most used by the practitioner, where, therefore, the cases are the most abundant. Nothing of value has been omitted from the former editions, but into this volume has been injected about ten thousand entirely new cases. This has been accomplished without enlarging the volume by a system of condensing and rewriting so that the new work contains less pages than would be required to print simply the names of the added cases. All elucidations have been enlarged and made clearer, and the author has fully explained the reason of every proposition of law not palpable on its face. The volume has been divided into eleven books, the various titles of which indicate the scope of the work. Book I. has to do with the Preliminary Outline. II. Some Leading Principles of the Procedure. III. Preparatory and Auxiliary to Indictment and Trial. IV. The Indictment and its Incidents. V. Other Forms of Accusations and Their Incidents.

VI. The Proceedings Between Indictment and Trial. VII. The Grand Jury and its Doings. VIII. The Trial by Petit Jury. IX. The Evidence. X. The Ordinary Proceedings after Verdict. XI. Some Miscellaneous Proceedings. This work is equally adapted to the use of the student, "who," as the author says, "if they do not want to master all of it can have excellent exercise in picking out what they want." Volume I is to be followed by Volume II entitled "New Criminal Law."

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WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION — Executor's Bond — Release by Laches.—The sureties on an executor's bond conditioned on the executor faithfully executing the duties of his trust according to law are not released, on the ground of laches, by the mere failure of the heirs to compel the executor to file an account.—BIGGINS V. RAISCH, Cal., 40 Pac. Rep. 333.

2. ADULTERY—Indictment.—An indictment for adultery, containing but one count, which charges the defendant with the commission of many acts of adultery with the same person at different times, charges more than one offense, and is bad for duplicity.—COMMONWEALTH V. FULLER, Mass., 40 N. E. Rep. 764.

3. ADVERSE POSSESSION. — Adverse possession does not run against the government.—WIGGINS V. KIRBY, Ala., 17 South. Rep. 354.

4. AGISTMENT—Horse Trainer.—Laws 1880, ch. 25, § 1, which provides that the keepers of livery and feed stables, herders, and feeders of stock for hire, shall have a lien for their charges and expenses as such, does not give a lien to one who is "a professional trainer of horses for speed," on horses which he has in his possession under contract to train. — SCOTT V. MERCER, Iowa, 63 N. W. Rep. 325.

5. ANIMAL — Dangerous Animals — Negligence.—One who harbors a dog in the habit of attacking passing teams, and who knows of the habit, and permits it to run loose, is liable for injuries received in a runaway caused by the dog's attack; and it is no defense that plaintiff knew of the dog's habit, and was not cautious in driving by defendant's house. — JONES V. CAREY, Dela., 31 Atl. Rep. 976.

6. APPEAL—Bond.—Where a bond on appeal has no validity as a statutory bond, a motion for judgment thereon should be denied, even if it is supported by a consideration, and is good as a common-law bond.—CENTRAL LUMBER & MILL CO. V. CENTER, Cal., 40 Pac. Rep. 334.

7. APPEAL BOND—Liability of Surety.—A judgment at the circuit for plaintiff was reversed on appaeal to the general term of the Supreme Court, and plaintiff appealed to the Court of Appeals, where, on consent of the parties and without consideration of the merits, a judgment was entered, reversing that of the general term, and affirming that of the circuit: Held, that this was not such an affirmance as would render liable the surety on the bond given on appeal to the general term.—FOO LONG V. AMERICAN SURETY CO., N. Y., 40 N. E. Rep. 730.

8. APPEAL FROM JUSTICE. — Under Sand. & H. Dig. § 4438, which provides that appeals from justices shall not be dismissed "for any defect in the affidavit or obligation for the appeal," it is error to dismiss because the affidavit on appeal has no venue.—ST. LOUIS & S. F. RY. CO. V. DEANE, Ark., 31 S. W. Rep. 42.

9. APPEAL FROM JUSTICE—Notice.—A notice of appeal in replevin from a justice to the Circuit Court, which fails to mention the value of the property as determined, and that such property was ordered to be delivered to plaintiff, is sufficient if it identifies the party appealing, and the cause in which and the judgment from which the appeal is taken.—HENDER V. RING, Wis., 63 N. W. Rep. 282.

10. APPEALABLE DECREE—A decree need not, in order to be appealable, dispose of all the merits of the case.—HAKE V. COACH, Mich., 63 N. W. Rep. 306.

11. APPEALABLE ORDER—Award to Widow.—An order vacating an award to a widow of her statutory allowance as excessive is not a final judgment, which the widow may have reviewed by writ of error or appeal.—LIPE V. FOX, Colo., 40 Pac. Rep. 353.

12. APPEARANCE—Effect as Giving Jurisdiction.—An appearance in the District Court on an appeal thereto, although for the purpose only of questioning its jurisdiction, gives jurisdiction for all purposes.—LANDA V. MERCANTILE & BANKING CO., Tex., 31 S. W. Rep. 55.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A deed of assignment was placed on record, but the assignee named therein, who was a clerk of the assignor, refused to accept the trust, and on the same day, on application of the preferred creditors, a receiver was thereupon appointed: Held, that placing the deed on record was a sufficient delivery thereof, and acceptance of the creditors will be presumed until the contrary appears, and, in the absence of fraud, the assignment was valid.—EWING V. WALKER, Ark., 31 S. W. Rep. 45.

14. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity. —The purpose of the statute, in reference to assignments for the benefit of creditors (chapter 3891, Laws

1889), is to enforce the equitable rule of securing an equal distribution of the property of the assignor among all his creditors, and this purpose, being clearly equitable, should be pursued in good faith.—ARMSTRONG v. HOLLAND, Fla., 17 South. Rep. 866.

15. ASSOCIATION—Unincorporated Church. — An action against the deacons and trustees of an unincorporated church on a note given by the deacons, in their official capacity, for furniture to be used in the church, is an attempt to sue the church as an organization, and cannot be maintained.—BURTON v. GRAND RAPIDS SCHOOL FURNITURE CO., Tex., 31 S. W. Rep. 91.

16. ASSUMPSIT—Quantum Meruit.—In an action on a *quantum meruit* to recover the price of logs sold, where in the original contract a method of scaling and measurement had been agreed upon as conclusive, although the vendee has put it out of the vendor's power to fulfill the contract, the vendor is, nevertheless, bound by the method agreed upon as to measurement of the logs actually delivered.—EAKRIGHT v. TORRENT, Mich., 63 N. W. Rep. 293.

17. ATTACHMENT—Action on Forthcoming Bond.—In an attachment where the defendant gives a bond to the officer, such officer is the proper person to bring suit on the bond.—WILSON v. DONNELLY, R. I., 31 At. Rep. 966.

18. ATTACHMENT — Notice by Publication. — Under Laws 1891, Act 8, providing that in a suit by attachment, where notice is given by publication, an affidavit shall be filed within 10 days after commencement of publication, and, if it is not filed as required, the attachment shall be dismissed, provided that the affidavit may be filed in the discretion of the court at any time before the order of dismissal shall actually be made, there is no abuse of discretion in refusing to allow the affidavit to be filed after the property has been sold under execution on judgment in the suit.—SAVIDGE v. OTTAWA CIRCUIT JUDGE, Mich., 63 N. W. Rep. 295.

19. ATTACHMENT—Waiver. — In attachment, no answer was filed to the affidavit, and plaintiffs tried the case on the theory that it was necessary to prove the allegations therein: Held, a waiver, and the issue must be determined as though such answer had been made.—SCHNULL v. MCPHEETERS, Ind., 40 N. E. Rep. 758.

20. ATTACHMENT BY COLLUSION—Judgment.— Where an attachment on a just debt has been obtained against a debtor, which is maintained, and a final judgment rendered for the amount demanded, creditors, who were not parties to the litigation, on discovering that the attachment was fraudulently and collusively obtained by an agreement between the creditor and debtor, cannot have the final judgment set aside, solely on the ground of collusion in obtaining the attachment, as this assertion could only serve to dissolve the attachment, which could not prevent the final judgment on the amount demanded. — JOHN HENRY SHOE CO. v. GILKESON SLOSS COMMISSION CO., La., 17 South. Rep. 340.

21. BANK—Negligence—Collection on Note.—In an action against a bank for failure to collect a certificate intrusted to it for collection, a petition alleging that the defendant did not present the certificate promptly, and that it surrendered the certificate to the payor, is defective, if it fails to aver that defendant could have collected the certificate, or that the surrender of the certificate to the payor prevented such collection, or that the payor, after receiving the certificate, refused to surrender it, or to state facts to show that defendant's alleged negligence caused plaintiff to lose his claim against the payor.—FARMERS' BANK & TRUST CO. OF STANFORD v. NEWLAND, Ky., 31 S. W. Rep. 38.

22. BANKS AND BANKING—Receiving Deposits when Insolvent.—Act Dec. 12, 1892, declaring a banker who receives a deposit, knowing his insolvency, to be guilty of a misdemeanor, punishable by fine of double the deposit, half to go to the depositor, with imprisonment in case of non-payment, but payment back to depositor of amount of deposit before conviction to be a defense, violates Const. art. 1, § 21, declaring that no person shall be imprisoned for debt.— CARR v. STATE, Ala., 17 South. Rep. 150.

23. BUILDING AND LOAN ASSOCIATION—Usurious Interest.—Plaintiff, a stockholder in defendant building and loan association, bid off, at a premium, a loan issued by defendant, and gave her note, bearing 10 per cent. interest, secured by a trust deed, with her stock as collateral, for the whole amount of the loan, but received only its amount, less the premium: Held, that while she remained a member of the association she was not entitled to cancellation of the trust deed on the ground that payment of interest on the premium was usurious, but was entitled to have the illegal interest, so paid, credited on the amount of dues and fines assessed against her stock.—PEOPLE BUILDING & LOAN ASS'N v. MCELROY, Miss., 17 South. Rep. 348.

24. CARRIERS OF PASSENGERS — Ejection from Train. —On a commutation ticket, and the coupons thereof, were printed provisions to the effect that the ticket was not good unless the coupons were detached by the conductor: Held, conceding that when the ticket was issued these conditions formed a part of the contract, it was competent for the parties subsequently to waive them. The practice of receiving as fare the coupons detached, and without presentation of the rest of the ticket, is evidence of such waiver. — THOMPSON v. TRUESDALE, Minn., 40 N. E. Rep. 259.

25. CHATTEL MORTGAGE — Confusion of Goods.—A chattel mortgagor cannot annul a mortgage by confusing other property with the property mortgaged, and, where the property mixed is of like kind and equal value, the more equitable rule is to give each party his due proportion, rather than to subject the whole to the mortgage.—MITTENTHAL v. HEIGEL, Tex., 31 S. W. Rep. 87.

26. CHATTEL MORTGAGE—Description.—A description of the property mortgaged by reference to another mortgage, wherein the property is specifically described, is sufficient.—THOMPSON v. ANDERSON, Iowa, 63 N. W. Rep. 355.

27. CONSTITUTIONAL LAW—County Officers — Validity of Act.—Sess. Laws 1891, p. 307, entitled "An act to provide for the payment of salaries to certain officers, to provide for the disposition of certain fees," etc., and fixing the salaries of certain public officers, and providing for the disposition of the fees collected for services performed in their official capacities, is not unconstitutional, as embracing more than one subject. —AIRY v. PEOPLE, Colo., 40 Pac. Rep. 362.

28. CONSTITUTIONAL LAW — Interstate Commerce—Peddler's License. — Under Rev. St. § 7211, declaring any person who deals in goods by going from place to place to sell the same to be a peddler, on who, as agent of an establishment located in another State, takes one of the harrows which it has shipped into the State to an agent, and goes through the country with it, sometimes selling the single harrow outright, at other times taking a written order and then delivering the one with him, and at other times taking a written order and then going back to the agent to whom they had been shipped for one, is a peddler.—STATE v. SNODDY, Mo., 31 S. W. Rep. 36.

29. CONTRACT—Subscription.—Action on.—Defendant subscribed a certain amount "for the purpose of securing the location in the city of C of the R. O. Co." a corporation. Plaintiffs were officers of the corporation, and, at the time of the removal of the business to C acquired all the stock of the corporation, and continued business as a firm: Held, that plaintiffs did not succeed to the rights of the corporation to sue on the subscription, as the contract was in consideration of the corporation locating at C. — KEYS v. WEAVER, Iowa, 63 N. W. Rep. 357.

30. CORPORATIONS—Contracts of Officers — Ratification.—A contract, made with the president of a railway company, who has general charge of its entire system, and whose acts the company is accustomed to

ratify in all cases, binds the corporation.—MISSOURI PAC. RY. CO. v. SIDELL, U. S. C. C. of App., 67 Fed. Rep. 464.

31. CORPORATION—Officer—Use of Name as Trustee. —Where the president of a loan company consented that securities in the nature of trust deeds should be made to himself, described as trustee, he thereby gained no right to use such designation to the injury of the company of which he was president, and which was in fact the beneficiary named or contemplated in such trust deeds.—TULLEYS v. KELLER, Neb., 63 N. W. Rep. 388.

32. CORPORATIONS — Stockholders—Bona Fide Purchaser.—One who purchases in good faith, in the open market, stock of a corporation which purports, on the face of the certificates, to be full paid and non-assessable, is not liable for assessment on such stock, though in fact it had not been fully paid.—ROOD v. WHORTON, U. S. C. C. (Wis.), 67 Fed. Rep. 434.

33. CORPORATIONS—Stock of Other Corporations.—A corporation has, in general, no authority to subscribe for stock of another corporation, when the law governing the corporation in which the stock is taken is of a substantially different character, and fails to impose the liabilities and obligations imposed by the law of the subscribing corporation: Held, therefore, that a subscription made by a private business corporation organized under the laws of Michigan, for stock of a similar corporation organized under the laws of New Jersey, which subscription was to be paid for by a transfer of the entire property and business of the Michigan corporation, was *ultra vires* and void.—MERZ CAPSULE CO. v. UNITED STATES CAPSULE CO. U. S. C. C. (Mich.), 67 Fed. Rep. 414.

34. COVENANT TO BUILD—Measure of Damages.— Defendants conveyed certain lots of an addition owned by them to plaintiff, in exchange for other property, and in consideration of his covenant to build on the lots: Held that, in determining the damages resulting from plaintiff's failure to build, it was proper to reject evidence that the property taken by defendants in exchange was not worth the amount at which all the parties valued it when the trade was made.—MCCONAGHY v. PEMBERTON, Penn., 31 Atl. Rep. 996.

35. CRIMINAL LAW—Change of Plea.—A motion in a criminal case to withdraw a plea of guilty, and to substitute therefor one of not guilty, is addressed to the discretion of the court, and, consequently, the court's action is not the subject of error.—CLARK v. STATE, N. J., 31 Atl. Rep. 979.

36. CRIMINAL LAW — Limitations. — Under Cr. Code, § 3711, providing that prosecutions for misdemeanor must be commenced within 12 months after the commission of the offense, the issuing of a warrant against a person for obtaining money under false pretenses does not prevent the running of the statute against an indictment, under section 3812, for obtaining $7.50 by entering into a contract in writing with intent to defraud an employer; it being a different offense, and a misdemeanor.—JACKSON v. STATE, Ala., 17 South. Rep. 349.

37. DEED—Building Restriction.— A roofed porch, built on brick foundations, and permanently attached to the whole front width of a house, though unincloseed, is within the prohibition of a building restriction in a deed that all buildings shall be erected not less than a certain number of feet back from the fence line.—OGONTZ LAND & IMPROVEMENT CO. v. JOHNSON, Penn., 31 Atl. Rep. 1008.

38. DEED—Conveyance of Homestead.— Code, § 1990, provides that the husband and wife must "concur in and sign the same joint instrument" conveying a homestead. The mortgage on a homestead was signed and acknowledged by both husband and wife, but the name of the wife alone appeared in the body of the instrument. Thereafter the parties duly executed a second mortgage to other persons, wherein they recited that it was subject to the first mortgage. Held, that the mere recognition of the void mortgage in the second mortgage did not make it valid.—SEIFFERT & WIESE LUMBER CO. v. HARTWELL, Iowa, 63 N. W. Rep. 333.

39. DEED—Delivery. — The delivery of a deed by a grantor to a third person, to be delivered by him to the grantee upon the grantor's death, is a valid delivery.—DINWIDDIE v. SMITH, Ind., 40 N. E. Rep. 748.

40. DEED—Rescission—Undue Influence.—A conveyance procured from a wife by her husband through threats to take her children away from her, and to prevent her seeing them again, is voidable, as obtained by undue influence.—KELLOGG v. KELLOGG, Colo., 40 Pac. Rep. 358.

41. DEED—Reservation of Right of Way.—The reservation of the right of ingress and egress, on foot and with teams, to and from the land on one side of that conveyed, reserves a right of way reasonably wide for the passage of teams.—GLEASON v. BURROUGHS, Wis., 63 N. W. Rep. 292.

42. DEED—Water Rights.—A deed conveying land and water rights in which the water rights are described "as one-half interest in a certain ditch" reserves in the grantor the use of one-half the water appropriated by the ditch, whether the entire water right is appurtenant to the land conveyed or not.—ARNETT v. LINHART, Colo., 40 Pac. Rep. 355.

43. DESCENT AND DISTRIBUTION—Action by Distributees.—After final settlement of an estate, and discharge of the administrator, the heirs and distributees may sue in equity to recover personal property unadministered upon, of which their ancestor was defrauded, the act "regulating the settlement of the estates of deceased persons" (Gen. St. Nev. 1885, ch. 19) not providing that heirs and distributees shall acquire title only through administration. — HUBBARD v. URTON (U. S. C. C.), Nev., 67 Fed. Rep. 419.

44. DIVORCE — Alimony — Death of Party.—Alimony continues only during the joint lives of the parties.—MAXWELL v. SAWYER, Wis., 63 N. W. Rep. 283.

45. EMINENT DOMAIN—Public Use—Drainage. — Laws 1891, ch. 401, provides for the construction of drains for agricultural, sanitary, or mining purposes across the lands of others, and for payment of damages to owners of lands injured by the construction thereof. The act does not declare that such drains are necessary or desirable to promote any public interest, convenience, or welfare: Held, that the advantages resulting there from are not of such a public character as to authorize the taking of private property for their construction. —IN RE THERESA DRAINAGE DIST, Wis., 63 N. W. Rep. 288.

46. EQUITY—Parties.—The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties, either as complainants or defendants, so that a complete decree may be made binding upon all parties.—ROBINSON v. HOWE, Fla., 17 South. Rep. 368.

47. EXECUTION—Claim—Notice.—Under Code, § 3055, providing that after levy the officer shall be protected from liability by reason of the levy till he receives written notice from a third person that he claims the property, it is sufficient to serve it on the deputy who made the levy, and claimant having delivered the notice and a copy to the deputy, and he having read the original and indorsed acceptance of service thereon, and returned it, keeping the copy, the service is sufficient.—PETERMAN v. JONES, Iowa, 63 N. W. Rep. 338.

48. EXECUTION—Property in Custodia Legis.—By garnishment of a mortgagee in possession of mortgaged chattels, such chattels are placed in custody of the law, and thenceforward are no more subject to actual seizure and appropriation to the satisfaction of another execution or writ of attachment than if they had actually been levied upon when the garnishment took place.—GRAND ISLAND BANKING CO. v. COSTELLO, Neb., 63 N. W. Rep. 376.

49. EXECUTION—Sale—Injunction.—An action will lie to enjoin a sale under execution, based on the mere

finding of a justice of the peace, without any judgment having been rendered thereon.—SARE v. BUTCHER, Ind., 40 N. E. Rep. 749.

50. FEDERAL COURTS—Circuit Court of Appeals.—In an action by a citizen of one State against a federal corporation, alleged to be a citizen of another State, the judgment of the Circuit Court of Appeals is not final, though jurisdiction is invoked on the sole ground of diverse citizenship, as the fact that defendant is a federal corporation would support jurisdiction; and by Act March 3, 1891, § 6, the judgment of the Circuit Court of Appeals in this class of cases is final only where jurisdiction is dependent entirely on the opposite parties to the controversy being citizens of different States.—UNION PAC. RY. CO. v. HARRIS, U. S. S. C., 15 S. C. Rep. 843.

51. FEDERAL COURTS—Jurisdiction—Citizenship.—L and S, who alleged that they were citizens of the State of Washington, brought suit in the United States Circuit Court against R, a citizen of Oregon. It appeared that L, for six years before her husband's death, resided with him in Oregon; that before her husband's death she had contemplated bringing the suit; that in a few months after his death she removed with her children to her mother's home in Washington, taking some articles of personal property, but leaving the bulk of her furniture in Oregon, where she owned a house and lot; that she remained a few months in Washington, and then returned to Oregon, ostensibly to secure the benefit of better schools for her children. L testified that she intended, some time, to return to Washington, and that she regarded her mother's farm, in that State, as her home, but her testimony, as to her purpose in returning to Oregon and her stay there was ambiguous: Held, that L was a citizen of Oregon, and the federal court had no jurisdiction of a suit between her and another citizen of that State.—LOOMIS v. ROSENTHAL, Oreg., 67 Fed. Rep. 369.

52. FIXTURES—When Part of Realty.—As between mortgagor and mortgagee, gas fixtures consisting of chandeliers and burners, screwed to the ends of the gas pipes projecting from the walls and ceilings of the building, are not a part of the realty.—CAPEHART v. FOSTER, Minn., 40 N. E. Rep. 257.

53. FOREIGN WILL—Probate.—Under Act March 23, 1887, a foreign will, devising land in Texas, need not be probated in Texas in order to render valid a title acquired thereunder.—DE ZBRANIKOV v. BURNETT, Tex., 31 S. W. Rep. 71.

54. FRAUDULENT CONVEYANCES—Sale of Exempt Property.—Since unpicked cotton growing on the homestead is exempt from forced sale, a sale of it cannot be fraudulent as against creditors.—EAVES v. WILLIAMS, Tex., 31 S. W. Rep. 86.

55. GUARDIAN OF INSANE PERSON—Unauthorized Investment.—The guardian of an imbecile invested the funds of his ward in a bank in a manner not authorized by the court. Upon the appointment of his successor he surrendered the certificate of deposit to him, and the latter made no report to the court of the condition of the ward's estate, obtained no direction as to how investments should be made, and allowed the money to remain where it was for 15 months, when the bank failed: Held, that the second guardian must account for the loss.—GARNER v. HENDRY, Iowa, 63 N. W. Rep. 359.

56. HOMESTEAD—Abandonment.—Plaintiff left certain premises with a purpose to return in six months, built and lived in another house on a lot which he paid for, witnessed and recorded a contract of sale of the same in which it was described as his homestead, and remained away from the property in question six years: Held an abandonment, and not a "temporary removal with the intention to reoccupy the same," under Rev. St. § 2983.—BLACKBURN v. LAKE SHORE TRAFFIC CO., Wis., 63 N. W. Rep. 289.

57. HOMESTEAD—Special Assessment.—A special assessment against a homestead for a sidewalk is not a "tax," within the meaning of Const. art. 16, § 50, subjecting homesteads to forced sales for taxes due thereon.—HIGGINS v. BORDAGES, Tex., 31 S. W. Rep. 52.

58. HUSBAND AND WIFE.—When, upon the sale of a wife's property, the husband takes purchase money notes payable to himself, there is such a reduction to possession as by the common law vested the title to a chose in action absolutely in the husband.—STULL v. GRAHAM, Ark., 31 S. W. Rep. 46.

59. INJUNCTION—Pledge.—A petition for an injunction which fails to show that the defendant threatens or intends to injure the plaintiff's property, or interfere with its rights, is demurrable. Mere averments that the plaintiff fears and believes that an injury will be done are insufficient.—COFFEYVILLE MIN. & GAS. CO. v. CITIZENS' NAT. GAS. &. MIN. CO., Kan., 40 Pac. Rep. 327.

60. INJUNCTION—Waste by Life Tenant.—Although the rule of the common law in relation to waste has been greatly relaxed in favor of the tenant, the preventive jurisdiction of courts of equity by means of injunction is still freely exercised in favor of the reversioner against a tenant in possession whenever the threatened acts amount to a manifest injury to the estate and a wanton abuse of the tenant's rights.—DISHER v. DISHER, Neb., 63 N. W. Rep. 368.

61. INSURANCE POLICY—Pleading—Demurrer.—In an action on an insurance policy conditioned on notice and proofs of loss being given by insured, and payable 60 days "after" the notice and proofs of loss are received by insurer, a complaint which fails to show that notice and proofs of loss were served 60 days before commencement of the action is demurrable.—PIERSON v. SPRINGFIELD FIRE & MARINE INS. CO., Dela., 31 Atl. Rep. 966.

62. INSURANCE POLICY—Variance.—In an action on an insurance policy defendant was sued as the "V Insurance Company." The policy filed as an exhibit showed that it was issued by the "V Life & Trust Trading & Manufacturing Company," although the company was also described in the policy as the "V Insurance Company." Defendant voluntarily appeared, and described itself in its answer as the "V Insurance Company:" Held, that the policy was not inadmissible because of the variance in defendant's name.—VERNON INS. CO. OF INDIANAPOLIS v. GLENN, Ind., 40 N. E. Rep. 759.

63. INTOXICATING LIQUOR—Licenses—Powers of Legislature.—The licensing of intoxicating liquors is an exercise of the police power, and not of the taxing power of the State to raise revenue.—ROCK COUNTY v. CITY OF EDGERTON, Wis., N. W. Rep. 291.

64. JUDGMENT—Amendment on Appeal.—Where it is uncertain whether a judgment for defendant disposed of and included a certain item pleaded by way of set-off, but it is inferable therefrom that it did not, and the judgment is excessive if it is not included, but as near as may be just if it is included, the judgment will be amended on appeal so as to be a bar to further recovery for such item.—WALKER v. WALKER, Iowa, 63 N. W. Rep. 331.

65. JUDGMENT—Fraud—Misconduct.—After a firm of attorneys had been employed by a defendant, a new member was taken into such firm, to whom the client revealed the evidence upon which he relied to defeat the action; and subsequently such attorney was employed by, and rendered assistance on the trial to, the adverse side, with full knowledge of the defendant, and without objections. A judgment was rendered in favor of the plaintiff: Held, in an action on such judgment in another State, the defendant could not set up as a defense thereto that the judgment was obtained by the fraudulent conduct of the attorney, but that, on calling of the original cause for trial, the defendant should have moved the court to exclude the attorney from appearing for and assisting the adverse side.—COX v. BARNES, Neb., 63 N. W. Rep. 394.

66. JUDGMENT—Priority of Lien.—Where judgments in favor of different persons are recovered on the same day against the same defendant, the judgment creditor first issuing execution and levying on

debtor's property acquires a prior lien thereon.—KESTERSON V. TATE, Iowa, 63 N. W. Rep. 350.

67. JUDGMENT—Sale of Community Property.—The sale of community property under a judgment recovered against the wife on a community debt, the husband having died before the action was brought, carries the title to the land as against the husband's heirs.—WHITE V. WACO BLDG. ASS'N. Tex., 31 S. W. Rep. 58.

68. LANDLORD AND TENANT—Tenancy by Sufferance.—Where the interest in land of a tenant by curtesy is sold under execution, tenants at will of the tenant by curtesy become tenants at sufferance of the purchaser, and therefore a lessee of the purchaser may bring summary proceedings, under Pub. St. ch. 175, § 1, for the recovery of the possession of the land.—MARSTER V. CLING, Mass., 40 N. E. Rep. 763.

69. LIFE INSURANCE— Appointment of Succession.—The mere fact that a policy has been made "payable to the assured, his executors, administrators, or assigns," does not authorize an insurance company to insist that the succession of the deceased policy holder should be placed in the hands of an administrator, in order to make payment to him, when the heirs have been placed in possession by order of court, unless special circumstances are shown, which would make a payment to the heirs dangerous.—PRATT V. MANHATTAN LIFE INS. CO. OF NEW YORK, La., 17 South. Rep. 341.

70. LIFE INSURANCE — Effect of Warranty. — Where neither a policy of life insurance nor the application upon which it is granted contains any stipulation that a breach of a warranty contained in the application shall *ipso facto* nullify the policy, the breach of such a warranty renders the policy voidable, but does not render it void, nor entitle the insurer to defeat a recovery upon it, unless he has seasonably manifested an intention to rescind the contract, and returned or tendered a return of the premiums.—SELBY V. MUTUAL LIFE INS. CO. OF NEW YORK, U. S. C. C. (Wash.), 67 Fed. Rep. 490.

71. LIFE INSURANCE — Representations. — Where the application for a policy of insurance is not made a part of the contract between the parties, and the policy contains no warranty of the truth of the statements in the application, both the materiality and the truth of the statements of the assured in applying for the policy are to be determined by the jury in an action on the policy; and a recovery cannot be defeated unless such statements, or some of them, are found to be both material and untrue.—FIDELITY & CASUALTY CO., OF NEW YORK V. ALPERT, U. S. C. C. of App., 67 Fed. Rep. 460.

72. LIFE INSURANCE — Suicide—Evidence. — Evidence that a person went to bed as usual, and in the morning was found drowned in a cistern, the opening to which was 15 by 20 inches, raises a presumption of suicide, so as to defeat recovery on a policy of life insurance excepting risks arising from suicide.—JOHNS V. NORTHWESTERN MUTUAL RELIEF ASS'N, Wis., 63 N. W. Rep. 276.

73. LIMITATIONS — Absence from State. — Defendant, after the cause of action against him had accrued, left the State on three different occasions, being absent in all about 30 months, but still maintained a residence in the State: Held, that Rev. St. § 4231, providing that, if the debtor "shall depart from and reside out of the State" after the cause of action has accrued, the running of the statutes of limitations shall be suspended during such absence, did not apply.—FARR V. DURANT, Wis., 63 N. W. Rep. 274.

74. LIMITATIONS—Admission by Part Payment.—One who willfully led plaintiff to believe that payments made by him, at the latter's request, to a creditor of the latter, were made as part payments on a certain debt due by him to plaintiff, is estopped to assert that they were not payments thereon such as would prevent the running of limitations.—CHASE V. CARNEY, Ark., 31 S. W. Rep. 43.

75. MALICIOUS PROSECUTION — Probable Cause.—If a prosecutor has fairly submitted to his counsel all the facts that he knows are capable of proof, and has acted *bona fide* on the advice given, he is not liable in an action for malicious prosecution, even though the facts did not warrant the advice and prosecution.—POUPARD V. DUMAS, Mich., 63 N. W. Rep. 301.

76. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, the pleadings and decree in an action between the same parties, wherein plaintiff claimed to be owner of the land, and relied upon the same facts to establish his rights that he relied upon in the criminal case for which he was prosecuted to justify his acts in destroying fences, are admissible to show that plaintiff had no right to destroy the fences in question, and that defendants had probable cause.—FLACKLER V. NOVAK, Iowa, 63 N. W. Rep. 348.

77. MANDAMUS—Approval of Appeal Bond.—A writ of *mandamus* will not issue to compel a probate judge to fix the amount of or approve an appeal bond for an appeal from an order removing the guardian of an insane person, where no notice of appeal is given, nor affidavit required by the statute is filed.—MCCLUN V. GLASGOW, Kan., 40 Pac. Rep. 329.

78. MASTER AND SERVANT—Assumption of Risk.—A brakeman who enters the employment of a railroad company to work on a construction train, and who can see that the road is not finished, and that trees border it on either side, assumes the risk of being struck by a tree growing close to the track, and in plain view.—MANNING V. CHICAGO & W. M. RY. CO., Mich., 63 N. W. Rep. 312.

79. MASTER AND SERVANT—Coal Mine Owner—Negligence.—It is the duty of the owner, agent, or operator of a coal mine to keep a supply of timber constantly on hand, and to deliver the same to the working place of the miner, and a failure so to do is negligence on his part, and, if injury is proximately caused thereby, an action will lie to recover damages therefor.—COAL CO. V. ESTIEVENARD, Ohio, 40 N. E. Rep. 725.

80. MASTER AND SERVANT — Degree of Care—Negligence.—The ordinary care required by an employer in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as good.—JOHNSON V. BOSTON & M. CONSOLIDATED COPPER & SILVER MIN. CO., Mont., 40 Pac. Rep. 298.

81. MASTER AND SERVANT — Negligence of Fellow-servant.—Where the work to be done requires only sufficient strength and a moderate degree of intelligence, the employer must, in selecting servants, exercise only that reasonable care which an ordinarily careful man exercises under similar circumstances, and not such care as will reduce the danger of accident to a minimum.—JUNGNITSCH V. MICHIGAN MALLEABLE IRON CO., Mich., 63 N. W. Rep. 296.

82. MASTER AND SERVANT—Risks of Employment.—S was a civil engineer, in the employ of defendant railway company charged with the duty of looking after the buildings and maintenance of bridges, trestles, etc. While traveling on the road, S was killed in an accident, caused by the collapse of a burning bridge, at a part of the track where no track walker or watchman was employed: Held that S assumed the risk arising from the absence of watchmen, and that there could be no recovery by his representatives for his death.—TEXAS & P. RY. CO. V. SMITH, U. S. C. C. of App., 67 Fed. Rep. 524.

83. MASTER AND SERVANT—Rule of Safe Place.—The rule requiring a master to provide a reasonably safe place in which his servant may perform his service does not apply to cases in which the very work the servant is employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety, as the work progresses, but in such cases the servant assumes the risks of the dangerous place, and of the increase of danger caused by

the work.—FINALYSON V. UTICA MINING & MILLING CO., U. S. C. C. of App., 67 Fed. Rep. 507.

84. MECHANIC'S LIEN—Nonsuit.—Plaintiff, in an action to foreclose a mechanic's lien, alleged a contract with the defendant for the work for which the lien was claimed. The evidence showed that the contract was made with another person, neither a party to the suit nor defendant's agent: Held, that a motion for a nonsuit should have been sustained.—GILLIAM V. BLACK, Mont., 40 Pac. Rep. 303.

85. MECHANIC'S LIEN—Rights of Subcontractors.—Subcontractors in the third degree are entitled to file a mechanic's lien under Comp. St. div. 5, § 1391, providing that "all persons furnishing things or doing work shall be considered subcontractors," and as such are entitled to a lien.—DUIGNAN V. MONTANA CLUB, Mont., 40 Pac. Rep. 294.

86. MEXICAN LAND GRANTS—Confirmation.—The official survey made of a Mexican land grant, after the grant has been confirmed by congress, is conclusive as against any collateral attack in the courts; and in ejectment by one claiming under the grant to recover lands lying within the survey from a person claiming the same under a subsequent homestead entry, evidence that the survey was incorrect, and that a correct survey would have excluded the lands in controversy, is not admissible.—RUSSELL V. MAXWELL LAND GRANT CO., U. S. S. C., 15 S. C. Rep. 827.

87. MINING CLAIM—Fraudulent Location.—Where, in an action to try title to a mining claim, defendants do not plead that plaintiffs' location was fraudulent, in that plaintiffs, with knowledge of the direction of the vein, located their claim in disregard thereof, and there was no evidence to prove such fraud, an instruction based on such a fraudulent location is erroneous.—WALSH V. MUELLER, Mont., 40 Pac. Rep. 292.

88. MORTGAGES — Assignment and Foreclosure. — A mortgagee, who has sold, assigned, and conveyed "all his right, title, and interest in and to" the mortgage, guarantying the notes secured thereby, cannot foreclose without the consent of the assignee, though the assignment is not recorded; and such a foreclosure is a nullity.—CUTLER V. CLEMENTSON, U. S. C. C., (Minn.), 67 Fed. Rep. 409.

89. MUNICIPAL CORPORATION—POWERS—Lighting System.—The power conferred upon cities of the second class, having over 5,000 inhabitants, to provide for and regulate the lighting of the streets, implies the power to erect and maintain an electric lighting system for that purpose.—CHRISTENSEN V. CITY of FREMONT, Neb., 63 N. W. Rep. 364.

90. MUNICIPAL CORPORATION—Public Improvements—Assessment. — A certificate as to the completion of street work, signed by a mere clerk, under a general direction of the city engineer to make out such certificates, is not sufficient, under St. 1891, p. 205, requiring such a certificate by the city engineer in order to make the amounts assessed a lien on the lands.—RAUER V. LOWE, Cal., 40 Pac. Rep. 337.

91. NEGLIGENCE. — A railroad company, on whose tracks a collision has occurred between a train and a number of tank cars containing petroleum, some of which have been broken, and the oil set on fire by the collision, and which neglects for two hours to remove the other cars of oil, in consequence of which some of them are set on fire by the burning oil, and explode, is liable to one who is injured by such explosion.—HENRY V. CLEVELAND, C. C. & ST. L. R. CO., U. S. C. C., (Ill.), 67 Fed. Rep. 426.

92. NEGOTIABLE NOTE—Alteration.—Where a blank space in a note had been left before and after the word "at," and the payee filled up the spaces so that the note read "payable at the bank of W," the maker is liable to a *bona fide* holder for value.—CASON V. GRANT COUNTY DEPOSIT BANK, Ky., 31 S. W. Rep. 40.

93. NEGOTIABLE NOTE—Bona Fide Purchaser.—On an issue as to whether plaintiff bank was a *bona fide* purchaser of certain notes, it appeared that the payee lived in a distant city, and that defendant lived in the county where plaintiff was located. The notes were unsecured; had 6 and 12 months, respectively, to run; had no provision for costs of collection; and the maker was not considered prompt. Plaintiff's cashier testified that he bought them at a discount: Held, that a finding that plaintiff was not an innocent purchaser would not be disturbed.—FIRST NAT. BANK OF MELVERN V. WADE, Iowa, 63 N. W. Rep. 345.

94. NUISANCE—Declaration by City Board of Health.—Under the provisions of Charter of St. Louis, art 12, § 6, and Revised Ordinances of St. Louis, ch. 14, art. 10, §§ 418, 419, providing for the abatement of a nuisance, after it has officially been so declared of record by the board of health, by the health commissioner notifying the owner to remove it, and that disobedience thereto shall render the owner liable to a fine, and that hearing by the board of health shall be on notice, and that notices shall be served in the same manner as summons in a civil case, service on one of the members of a farm owning the property claimed to be a nuisance, of notice of hearing by the board of health, will not affect another member.—CITY OF ST. LOUIS V. FLYNN, Mo., 31 S. W. Rep. 17.

95. ORDER—Acceptance—Statute of Frauds.—An order was drawn by M on defendant, in favor of plaintiff, and defendant at the time was indebted to M, and the amount of the order, when collected, was to be applied on the indebtedness of M to plaintiff; but there was no novation, nor was there a previous agreement to accept the order: Held, that an oral acceptance thereof was within How. Ann. St. § 6185, which makes invalid the oral promise to pay the debt of another.—UPHAM V. CLUTE, Mich., 63 N. W. Rep. 317.

96. PAROL EVIDENCE. — Where a deed is unconditional on its face, the contrary cannot be proved by parol.—MAGEE V. ALLISON, Iowa, 63 N. W. Rep. 322.

97. PARTITION PROCEEDINGS.—Under Rev. St. 1881, § 1186 (Rev. St. 1894, § 1200), providing that any person holding lands as joint tenant or tenant in common may compel partition thereof, one who holds an undivided interest in fee may bring an action for partition against the life tenant of the other undivided interest and the owners of the remainder therein.—TOWER V. TOWER, Ind., 40 N. E. Rep. 747.

98. PARTNERSHIP—Contract.—Where in an action to settle a partnership, the evidence merely shows that one of the partners contributed the capital and the other the labor and skill, a finding that the agreement in case of a dissolution was that the party furnishing the capital should first be repaid the amount, and only the remainder divided between the partners, would be warranted.—WASHINGTON V. WASHINGTON, Tex., 31 S. W. Rep. 88.

99. PRINCIPAL AND SURETY — Contribution.—In an action by sureties on the bond of an insolvent executor, against a cosurety, for contribution, a petition alleging the execution of the bond by plaintiffs and defendant, the insolvency of the executor, the payment of his indebtedness to the estate by plaintiffs upon being threatened with suit, and defendant's failure to contribute to such payment, was good against general demurrer.—HARDELL V. CARROLL, Wis., 63 N. W. Rep. 275.

100. RAILROAD COMPANIES—Abandonment.—When a railroad has been abandoned in the manner prescribed in Laws 1887, Act No. 275, and no reasonable provision made for traffic between the points abandoned, those who have contributed to its construction are entitled, by Pub. Acts 1891, No. 125, to have their contributions refunded, with interest for five years.—IN RE FLINT & P. M R. CO., Mich., 63 N. W. Rep. 303.

101. RAILROAD COMPANY—Consolidation—Estoppel.—Rev. St. 1894, § 5257 (Rev. St. 1881, § 3971), providing that any railroad corporation in the State may consolidate its stock with that of a railroad corporation in an adjoining State, "upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State," does not require that a meeting of the stockholders of a corporation in the

State, called to act upon a proposition to consolidate with a corporation in an adjoining State, shall be called and conducted in accordance with the laws of such adjoining, State, but only that the terms of consolidation shall not conflict with those laws.—BRADFORD v. FRANKFORT, ST. L. & T. R. CO., Ind., 40 N. E. Rep. 741.

102. RAILROAD COMPANY — Fraudulent Evasion of Fare.—One who fraudulently evades the payment of his fare upon a railway train is not a passenger, and the railway company owes him no duty, except to abstain from willful or reckless injury to him; and this rule is not abrogated by the Iowa statute (McClain's Ann. Code, § 2002) providing that railway companies shall be liable for damages sustained by "any person" through negligence of its agents.—CONDRAN v. CHICAGO, M. & ST. P. RY. CO., U. S. C. C. of App., 67 Fed. Rep. 522.

103. RAILROAD COMPANY—Incompetency of Fellow-servant.—A complaint states a sufficient cause of action against a railroad corporation if, from allegations that the person in charge of a locomotive was incompetent, and not a locomotive engineer, and that decease was injured by reason of the negligence and carelessness of defendant in permitting an incompetent person to run the engine, when construed with other allegations reciting the circumstances of the injury, it sufficiently appears that the negligence of the incompetent employee was the proximate cause of the injury.—CHICAGO & E. I. R. CO. v. BEATTY, Ind., 40 N. E. Rep. 753.

104. RAILROAD COMPANY—Injury to—Negligence.—A section hand, who crosses from the track on which he is working onto another track just in front of cars pushed by a switch engine, without looking, and with his shoulder turned towards them, though they were in plain sight, and though he knew that they would soon pass, is guilty of contributory negligence.—LORING v. KANSAS CITY, FT. S. & M. R. CO., Mo., 31 S. W. Rep. 6.

105. RAILROAD COMPANY—Liability for Injuries.—Under How. Ann. St. § 3323, requiring a railroad constructing its road across a highway to restore the highway to its former state as nearly as may be, and to construct suitable crossings for teams; and Laws 1887, Act No. 35, conferring upon a company acquiring title to a railroad at foreclosure sale all the privileges and franchises enjoyed by the original company—a company acquiring title to a railroad at foreclosure sale is liable for an injury occurring after the purchase resulting from a failure of its predecessor to restore a highway crossed by its road to its former state, and to provide a suitable crossing for teams.—GAGE v. PONTIAC, O. & N. R. CO., Mich., 63 N. W. Rep. 318.

106. RAILROAD COMPANIES—Receivers — Liability for Negligence.—A railroad company is not liable for personal injuries caused by the negligent operation of the road while in the exclusive possession and occupation of receivers.—MEMPHIS & C. R. CO. v. HOECHNER, U. S. C. C. of App., 67 Fed. Rep. 456.

107. RAILROAD COMPANY — Stock Killing.—Plaintiff having made a *prima facie* case by showing that his cattle were killed on defendant's track where it was not fenced, the burden was on defendant of showing, as an excuse for not fencing it, that a fence would have endangered the lives and limbs of defendant's employees engaged in switching.—COX v. ATCHISON, T. & S. F. R. CO., Mo., 31 S. W. Rep. 3.

108. RAILROAD COMPANY—Street Car Company—Injury to Child.—The degree of care required at the crossing of a highway and an ordinary steam railway, as, for example, in looking up and down the track, is not necessarily the test of care required in crossing the track of a street railway on a public street.—HOLMGREN v. ST. PAUL CITY RY. CO., Minn., 63 N. W. Rep. 270.

109. RAILROAD COMPANY — Street Railway.—Though plaintiff was wanting in ordinary care in attempting to cross defendant's tracks, he may recover if defendant's employee, in the exercise of ordinary care might have avoided the accident after he saw plaintiff, or by the use of ordinary care, might have seen that plaintiff was in danger of being struck.—BALTIMORE TRACTION CO. v. APPEL, Md., 31 Atl. Rep. 964.

110. REAL ESTATE AGENTS—License—Commissions.—Where a city ordinance prohibits real estate brokers from carrying on their business before procuring a license, one who sells land without a license cannot recover commissions for his services.—RICHARDSON v. BRIX, Iowa, 63 N. W. Rep. 425.

111. RECEIVERS—Liabilities.—Where a receiver followed the conclusions of law of the court, and made part payment of plaintiff's claim, and paid other claims as therein directed, and thereafter the decree was filed which directed the receiver to pay plaintiff in full, the receiver is obliged to do so, though the decree is inconsistent with the conclusions, and he has not sufficient funds left to pay the amount directed in the decree, which he did not complain of for two years.—BARTLETT v. REICHENEKER, Wash., 40 Pac. Rep. 339.

112. REMOVAL OF CAUSES—Jurisdictional Amount.—A cause is not removable to a United States court for the reason that the prayer for relief asks for "$2,000 and all other proper relief," when, under the pleadings, there was no other proper relief obtainable.—BALTIMORE & O. R. CO. v. WORMAN, Ind., 40 N. E. Rep. 751.

113. REMOVAL OF CAUSES—Separable Controversy.—In an action against several defendants, where the plaintiff's complaint states but a single cause of action, the interposition of separate defenses by the different defendants does not make a separable controversy with each, which can be removed to a Federal court without the removal of the whole cause.—THURBER v. MILLER, U. S. C. C. of App., 67 Fed. Rep. 371.

114. REPLEVIN BY CHATTEL MORTGAGE.—A mortgagee is entitled to the possession of the mortgaged chattels, and if the sheriff has taken them under an execution against the mortgagor, and refuses, on demand, to deliver them to the mortgagee, replevin will lie.—KOENIG v. SMITH, N. J., 31 Atl. Rep. 979.

115. SALE — Change of Possession. — Where personal property is transferred by a debtor to a third person on his promise to pay a claim, and a receipt is given therefor, credit being entered on the books of the firm holding such claim, and the property is placed under lock in a vacant room, the possession of said property was acquired in an open manner, as against persons claiming under a subsequent attachment against the former owner.—CONLY v. FRIEDMAN, Colo., 40 Pac. Rep. 348.

116. SALE OF LUMBER — Passing of Title. — In the absence of fraud, the title to lumber cut in compliance with an agreement by plaintiff to buy the lumber cut by defendant's mill for a year passed, as between grantor and grantee, when the lumber was separately stacked, marked with plaintiff's initials, measured, and a formal, unconditional bill of sale executed and delivered, though plaintiff still owed a balance on the lumber, which was not to be paid till shipped.—COLLINS v. WAYNE LUMBER CO., Mo., 31 S. W. Rep. 24.

117. SALE OF MERCHANDISE — Vendor's Lien. — A vendor of personal property, who has possession thereof at the time of the insolvency of the vendee, may assert a vendor's lien thereon for the unpaid purchase price, although he has previously accepted the vendee's notes for the full amount. — VOGELSANG'S ADM'R v. FISHER, Mo., 31 S. W. Rep. 18.

118. SET-OFF—Breach of Contract.—Where, upon default of the contractor, the architect, acting for the owner, let to the lowest bidder the contract for the completion of a building, the owner was entitled to set off against the original contractor or any subcontractor the actual amount paid for the completion of work.—YEOMANS v. PARKER, Mich., 63 N. W. Rep. 316.

119. SLANDER—Pleading.—A complaint in an action for slander alleged that the defendant said to plaintiff, in the presence of others, "Just as well as you believe

of mother that my wife has beaten her, just so well we can believe that mother said, 'E (meaning plaintiff) has penned up pigs belonging to T, and has knocked them on the head, and devouringly eaten them up:'" Held, that such words are not actionable *per se*, and, in the absence of anything to show the circumstances leading up to the alleged charge, and by way of *innuendo*, the complaint was demurrable.—PANDO v. EICHSTED, Wis., 63 N. W. Rep. 284.

120. SPECIFIC PERFORMANCE—Sufficiency of Contract.—An agreement to supply water "for three years or longer," at the option of one of the parties at a fixed compensation per annum, is not void for indefiniteness as to duration, and constitutes one contract, which can be specifically enforced. — CHRISTIAN & CRAFT GROCERY CO. v. BIENVILLE WATER-SUPPLY CO., Ala., 17 South. Rep. 352.

121. STATUTE—Appeal.—An objection that a statute is unconstitutional because the manner prescribed by the constitution was not observed by the legislature in its passage, cannot be raised for the first time in the Appellate Court.—SARGENT v. BOARD OF COM'RS OF LA PLATA COUNTY, Colo., 40 Pac. Rep. 366.

122. TAXATION — Recovery of Taxes Paid County.—Where a town treasurer collected taxes, and appropriated them, but returned them to the county treasurer as unpaid and delinquent, and, on this being found out, the amount thereof was charged back to the town, and added to the county tax apportioned to the town for the following year, and collected and paid to the county, the town cannot sue to recover them of the county, because they never belonged to the town, as they were raised directly from the taxpayers for the county, the town treasurer acting as the county's agent in collecting them.—TOWN OF WESTBORO v. TAYLOR COUNTY, Wis., 63 N. W. Rep. 287.

123. TAXATION OF CATTLE OF NON-RESIDENTS.—Act Feb. 1, 1879, § 1, providing that non residents grazing cattle in any county in the state shall pay certain fixed sums per head therefor in lieu of taxes on such animals, is void, as conflicting with Const. art. 10, § 3, which declares that "all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws."—BOARD OF COM'RS OF KIOWA COUNTY v. DUNN, Colo., 40 Pac. Rep. 357.

124. TAXATION OF REAL ESTATE.—The provision of Laws 1891, ch. 40, § 48, that the assessor shall determine the value of each piece of real property listed for taxation, and shall enter the value thereof opposite each description of property, is for the benefit of the property owner, and therefore mandatory, and a failure to comply therewith invalidates the assessment.—LOCKWOOD v. ROYS, Wash., 40 Pac. Rep. 346.

125. TOWN — Defective Highway. — In an action against a town for injuries received by plaintiff while driving onto a highway from a way which had been cleared by the side of the highway for the passage of teams, owing to the presence of impassable snowdrifts on the highway, it was proper to charge that the town would not be liable if the highway at that point was, under all the circumstances, in a reasonably safe condition for the passage of teams.— VASS v. TOWN OF WAKUKESHA, Wis., 63 N. W. Rep. 280.

126. VENDOR AND PURCHASER — Insane Grantor. — A deed of an insane grantor is absolutely void, and therefore a *bona fide* purchaser from the grantee takes no title.—GERMAN SAVINGS & LOAN SOC. v. DE LASH MUTT, U. S. C. C. (Oreg.), 67 Fed. Rep. 399.

127. VENDOR AND VENDEE — Exchange — Assumption of Mortgages.—Where two persons exchange property, each assuming mortgages of the other thereon, in equal amounts, and both make default in the payment of the obligations assumed, neither party, nor his mortgagee standing in his stead, can recover anything from the other, as the obligations mutually cancel each other.—EPISCOPAL CITY MISSION v. BROWN, U. S. S. C., 15 S. C. Rep. 833.

128. VENUE.—Sanb. & B. Ann. St. § 2624, declaring that where an action begun in the municipal court is pending on appeal in the Circuit Court, defendant may have the place of trial changed to the county where he resides, if he resided there when the action was commenced, secures an absolute right to change of venue in such case, and it is not modified or repealed by Laws 1891, ch. 139, § 2, providing that a petition for a laborer's lien shall be filed in the county where the labor was performed, or, when the property has been taken to another county, that the petition may be filed, and an action to foreclose the lien brought in such county.—RAYSON v. HORTON, Wis., 63 N. W. Rep. 278.

129. WARRANTY—Damages.—In an action against a railroad company for breach of warranty in a conveyance of land, defendant may show that the consideration paid was unmatured junior bonds of defendant worth less than par, as the measure of damages is the value of the bonds given for the lands, with interest.—MONTGOMERY v. NORTHERN PAC. R. CO., U. S. C. C. (Oreg.), 67 Fed. Rep. 445.

130. WATERS—Irrigation—Private Ditch.—Act Feb. 12, 1881 (Sess. Laws, p. 164; Gen. St. 1883, § 1716 *et seq.*), provides that no person having constructed a private irrigation ditch through land of another shall prevent another person from enlarging or using such ditch in common with him on payment of a reasonable compensation: Held, that the ditches subject to enlargement are strictly private ditches, and therefore a city cannot compel an irrigation company carrying water for sale to its patrons to permit it to enlarge its ditch for the purpose of supplying its citizens with water for the same purposes.—JUNCTION CREEK & N. D. D. & I. DITCH CO. v. CITY OF DURANGO, Colo., 40 Pac. Rep. 356.

131. WATERS — Overflowing Land — Damages.—The doctrine of this court is the rule of the common law that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment; and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor.—CITY OF BEATRICE v. LEARY, Neb., 63 N. W. Rep. 370.

132. WILLS—Bequest.—A husband executed a bond for $6,000, payable upon his death to the wife, or her heirs, "in full of all other demands of dower or otherwise," in his property, and secured the same by mortgage on his property. Subsequently he executed a will with a provision as follows: "I give, devise and bequeath, in lieu of all other allowances, to my wife the sum of $6,000.00," for her own use and during her life: Held, that the bequest in the will was a substitute for the amount due by the bond.—GRAVES v. GRAVES' EX'R, Wis., 63 N. W, Rep. 271.

133. WILL.—Where testator devised his property to be equally divided between his son and his wife, with a provision that, if the wife died without issue, the property should go to the son if living, and, if dead, to his nearest heirs, the property passed, on the death of the widow without issue, after the son's death, to the heirs of the son.—CHACE v. GREGG, Tex., 31 S. W. Rep. 76.

134. WILL — Conversion. — Where the executors, acting under a general power in the will, have sold the realty, and received the proceeds, such proceeds are personalty, and may be applied to the payment of the testator's debts.—BOLTON v. MYERS, N. Y., 60 N. E. Rep. 737.

135. WILLS—Election by Devisee.—A clause in a will bequeathing to a certain legatee "one thousand dollars, either in stocks or money," entitles him, in case of his election to take stock, to $1,000 worth of such stocks at their market value.—GRAHAM v. DE YAMPERT, Ala., 17 South. Rep. 355.

136. WITNESS—Husband and Wife.—Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married. Nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.—BUCKINGHAM v. ROAR, Neb., 63 N. W. Rep. 398.